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CC Docket No. 97-21

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- Exhibit "21" - Excerpt from January 21, 2003 Board of Trustees Meeting Minutes
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- Exhibit "23" - Relevant Excerpts from Year 2002 Selective Review Response
- Exhibit "24" - Follow-up Materials from Year 2002 Selective Review Response
- Exhibit "25" - Form 470 Instructions
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- Exhibit "28" - Excerpt from current District General Ledger
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- Exhibit "33" - Affidavit of Jack Johnston

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C.**

In the Matter of:	§	
	§	
Request for Review of the Decision of the	§	
Universal Service Administrator by	§	
	§	
El Paso Independent School District	§	
	§	
	§	
Federal-State Joint Board on Universal Service	§	CC Docket No. 96-45
	§	
Changes to the Board of Directors of the	§	CC Docket No. 97-21
National Exchange Carrier Association, Inc.	§	

**REQUEST FOR REVIEW
OF EL PASO INDEPENDENT SCHOOL DISTRICT**

I. INTRODUCTION

El Paso Independent School District ("EPISD"), by its attorneys, hereby requests review of the following Funding Commitment Decision Letters issued by the Universal Service Administrative Company, Schools and Libraries Division dated December 30, 2003 for Funding Year 2003-2004 of the E-Rate Program of the Federal Communications Commission:

- a. Funding Commitment Decision Letter for Internal Connections - 376953 (the "Decision No. 1");
- b. Funding Commitment Decision Letter for Telecommunications - 377214/1034294 (the "Decision No. 2");
- c. Funding Commitment Decision Letter for Internal Connections - 377156 (the "Decision No. 3");
- d. Funding Commitment Decision Letter for Internet Access - 377297 (the "Decision No. 4");

- e. Funding Commitment Decision Letter for Internal Connections - 374802 (the "Decision No. 5");
- f. Funding Commitment Decision Letter for Internal Connections - 376873 (the "Decision No. 6"); and
- g. Funding Commitment Decision Letter for Internal Connections - 377101 (the "Decision No. 7"),

(collectively, the "Decisions"). True and correct copies of the Decisions are set forth as Exhibits "1" through "7" respectively to the accompanying Appendix, and are incorporated herein. This Request for Review is made by EPISD pursuant to 47 C.F.R. §54.719.

EPISD posted Form 470 notices (collectively, the "Form 470") for Funding Year 2003-2004 (the "Funding Year 2003") of the E-Rate Program (the "Program"). True and correct copies of the Form 470 are set forth as Exhibit "8" to the accompanying Appendix, and are incorporated herein.

Thereafter, on a timely basis and after the requisite competitive procurement required by rules of the Federal Communications Commission (the "Commission") under the Program, EPISD filed the following Form 471 applications:

- a. Form 471 Application for Internal Connections - 376953 (the "Form 471 Application No. 1");
- b. Form 471 Application for Telecommunications - 377214 (the "Form 471 Application No. 2A");
- c. Form 471 Application for Telecommunications - 1034294 (the "Form 471 Application No. 2B");
- d. Form 471 Application for Internal Connections - 377156 (the "Form 471 Application No. 3");
- e. Form 471 Application for Internet Access - 377297 (the "Form 471 Application No. 4");

- f. Form 471 Application for Internal Connections - 374802 (the "Form 471 Application No. 5");
- g. Form 471 Application for Internal Connections - 376873 (the "Form 471 Application No. 6"); and
- h. Form 471 Application for Internal Connections - 377101 (the "Form 471 Application No. 7"),

(collectively, the "Form 471 Applications"). True and correct copies of the Form 471 Applications is set forth as Exhibits "9" through "16" to the accompanying Appendix, and are incorporated herein.

By the Decisions, the Universal Service Administrative Company, Schools and Libraries Division (collectively, the "SLD") refused funding for EPISD for Funding Year 2003-2004 (the "Funding Year 2003") of the E-Rate Program (the "Program"). In the Decisions, the SLD contends that EPISD failed to demonstrate that EPISD had secured access to EPISD's portion of charges, as required by Commission rules.

For the reasons set forth below, each of the Decisions is erroneous, and the Commission should reverse the Decisions and award full funding to EPISD under the Form 471 Applications, at least consistent with the funding levels granted to other recipients with a similar "free and reduced lunch" proportion of their school populace. At minimum, the matters should be remanded to the SLD for further consideration.

II. SUMMARY

In each of the Decisions, the SLD denied funding on the following grounds:

Insufficient support resources.

During application review, you were asked to demonstrate that when you filed your Form 471, you had secured access to the funds needed to pay your portion of the charges, and you were unable to do so.

These contentions are without merit.

In actuality, EPISD did timely and properly secure funds to pay its portion of the charges under each of the Form 471 Applications. EPISD in fact adequately demonstrated to the SLD that EPISD had so secured such funds.

The Decisions should be reversed as a result.

III. FACTUAL BACKGROUND

EPISD is an independent school district under Texas law located in El Paso County, Texas. EPISD participated, or sought to participate, in prior funding years of the Program, and sought to continue that participation during Funding Year 2004.

EPISD has had a longstanding technology plan, as modified (the "Technology Plan"), upon which its Program participation has been based. A true and correct copy of the current Technology Plan is attached to the Appendix as Exhibit "17", and is incorporated herein.

For Funding Year 2003, EPISD sought Program funding for separately for Internet access service, various components of internal connections services, and various components of telecommunications services. The funding requested by EPISD from the SLD for Funding Year 2003 under each of the Form 471 Applications is as follows:

<i>Application No.</i>	<i>Requested Amount</i>	<i>Service Provider</i>
Form 471 Application No. 1	\$2,215,200.00	Diversified Technical Services
Form 471 Application No. 2A	1,800,000.00	Southwestern Bell
Form 471 Application No. 2B	10,800.00	AT&T

Form 471 Application No. 3	59,200.00	Amherst Computer Products
Form 471 Application No. 4	114,672.00	Region 19 Educational Service Center
Form 471 Application No. 5	4,164,500.00	Desert Communications
Form 471 Application No. 6	2,361,682.00	Desert Communications
Form 471 Application No. 7	<u>299,006.00</u>	Amherst Computer Products
TOTAL	\$11,025,060.00.	

Under Program rules, EPISD would be essentially responsible to pay a specified percentage of the eligible charges from the service providers under those projects for which its Form 471 Applications are granted. The applicable percentage for eligible site-based projects is 10%, whereas the applicable percentage for eligible district-wide projects is 22% [based upon a formula established by the SLD, using EPISD's free and reduced lunch figures]. Assuming all of the Form 471 Applications were granted by the SLD, EPISD would be responsible for paying a maximum of \$1,464,860.32 as its share of the charges. For purposes of this Request for Review, the term "EPISD's Share" shall refer to this proportion of the eligible charges in connection with the projects for which one or more Form 471 Applications [as the context may indicate] is granted.

At the time of filing the Form 471 Applications, EPISD possessed a balance of unencumbered and unallocated funds owned by it in the aggregate amount of \$76,414,863, commonly referred to as the "Fund Balance". The Fund Balance, to be clear, represents monies owned and possessed by EPISD as its reserves, that have not be allocated for any particular project or expense and are available for use to pay EPISD's Share for projects under all of the Form 471 Applications.

After March 14, 2003, EPISD received an E-Rate Selective Review Information Request from the SLD, more commonly known as the Item 25 Selective Review (the "Year 2003 Selective Review Request"). A true and correct copy of the Year 2003 Selective Review Request is set forth on the accompanying Appendix as Exhibit "18", and is incorporated herein. The Year 2003 Selective Review Request, among other things, requested information from EPISD on securing of funds for the EPISD Share. The Year 2003 Selective Review Request is, to EPISD's knowledge, is commonly forwarded to many or all applications for Program funding.

EPISD timely and comprehensively responded to the Year 2003 Selective Review Request, by means of a response dated April 13, 2003 (the "Year 2003 Selective Review Response"). A true and correct copy of relevant excerpts from the Year 2003 Selective Review Response are set forth on the accompanying Appendix as Exhibit "19", and are incorporated herein.¹ The excerpted portion of the Year 2003 Selective Review Response apply to the financial issues. At the time of submitting the Year 2003 Selective Review Response, the Fund Balance of EPISD was \$39,162,440.

EPISD also had discussions with SLD staff regarding the Year 2003 Selective Review Request and/or the Year 2003 Selective Review Response. At least one of those contacts involved a request for EPISD's budget, if available. EPISD responded that no draft or final budget was then available, referring back to the materials contained in the Year 2003 Selective Review Response. A true and correct copy of EPISD's response is set forth on the Appendix as Exhibit "20", attached hereto and incorporated herein. The SLD request did not indicate by its terms that the SLD felt the

¹ The complete Response was approximately 8 inches deep in size, so only relevant excerpts are enclosed.

Year 2003 Selective Review Response was inadequate with respect to the issue of EPISD's securing of funds for the EPISD Share.

Importantly, after that point, EPISD and SLD staff had further, detailed discussions and communications on a myriad of issues through October 2003. None of those further discussions or communications, however, included any comment by the SLD that the Year 2003 Selective Review Response was, in SLD's opinion, insufficient with respect to the issue of EPISD's securing of funds for the EPISD Share. If the SLD really believed at the time that EPISD had not established that point, one wonders why the SLD continued to spend significant time and effort discussing all of these other issues with EPISD, with substantial oral and written information and materials being shared between them, from April through October 2003.

In short, EPISD never received any written or oral communication from the SLD, prior to the Decisions, expressly indicating that SLD believed the Year 2003 Selective Review Response to be inadequate in the SLD's opinion with respect to the issue of EPISD's securing of funds for the EPISD Share.

After December 30, 2003, EPISD received each of the Decisions. In each of the Decisions, the SLD ruled that funding under the respective Form 471 Application should be denied, on the basis of the following:

Insufficient support resources.

During application review, you were asked to demonstrate that when you filed your Form 471, you had secured access to the funds needed to pay your portion of the charges, and you were unable to do so.

The Decision is presumably contending that EPISD failed to demonstrate that it had secured funds

for the EPISD Share.

The Decisions represent the final decisions of the SLD on the Form 471 Applications. This Request for Review before the Commission is being timely made within 60 days of the date of the Decisions.

In support of this Request of Review, EPISD also incorporates by reference the affidavit set forth on Exhibits "33" of the Appendix, and the other exhibits in such Appendix.

IV. DISCUSSION

In the Decisions, the SLD erroneously contends that EPISD failed to demonstrate that it had secured access to funds needed to pay EPISD's portion of the charges

1. EPISD in fact had secured access to funds needed to pay EPISD's portion of the charges.

In the Decisions, the SLD alleges that EPISD failed to demonstrate that EPISD had secured the funds to pay the EPISD Share. That allegation is without merit.

In the first place, it is absolutely clear that EPISD had in fact secured the funds necessary to pay the EPISD Share. The EPISD Share would be a maximum of \$1,464,860.32. The Fund Balance of EPISD was \$76,414,863 at the time the Form 471 Applications were filed, as indicated by Exhibit "30" to the Appendix [incorporated herein by reference]. The Fund Balance was \$39,162,440 at the time the Year 2003 Selective Review Response was filed, as indicated by Exhibit "31" to the Appendix [incorporated herein by reference]. The Fund Balance is now \$28,734,770, as indicated by Exhibit "32" to the Appendix [incorporated herein by reference]. Again, the Fund Balance represents unallocated, available "reserve" funds are available to pay the EPISD Share.

EPISD generally does not adopt its budget until shortly before August 31 of each year. The

draft budget often is not fully prepared until July or August of each year. The budget was not available when requested by the SLD, as indicated by EPISD. It should be noted, however, that the current EPISD general ledger includes a line-item for the EPISD Share, as shown on Exhibit "28" to the Appendix [incorporated herein by reference].

In light of the Fund Balance, EPISD certainly had sufficient resources to pay the EPISD Share. EPISD had more than enough available funds to pay for the EPISD Share for each and all of the Form 471 Applications.

Each of the Decisions is erroneous in this regard

2. EPISD in fact demonstrated that it had secured access to funds needed to pay EPISD's portion of the charges.

The SLD's contention that EPISD failed to demonstrate that EPISD had secured the funds to pay the EPISD Share is also without merit, in light of the Year 2003 Selective Review Response and other information and materials provided to the SLD.

In the Year 2003 Selective Review Response, EPISD provided a memorandum from its Interim Associate Superintendent - Finance dated April 1, 2003, set forth on Exhibit "19" to the Appendix [incorporated herein by reference], stating that:

The District will budget for any funds required if notice of award is received before August 1, 2003, and will be prepared to amend the budget for up to the \$1,464,860.32 if notice of the award is received after August 1, 2003. The undesignated fund balance of the District is sufficient to make this assertion.

If there are any questions on this memo. I would be glad to respond to any additional questions by phone or email.

The cover letter to the Year 2003 Selective Review Response, also found at Exhibit "19", indicated that EPISD then did not have a draft or final budget available, but discusses the memorandum.

EPISD never received any question or comment on that memorandum, and was never expressly advised [until the Decisions were issued] that the SLD believed that the memorandum was insufficient. EPISD staff have enjoyed a good working relationship with SLD officials [despite disagreements from time to time on certain issues], and have in the past provided supplemental information and materials when requested by SLD. Here, the SLD did not ask for any additional information or materials on EPISD's finances, other than the single subsequent request for the budget [again, at a time when even a draft one was not available]. EPISD and SLD personnel spoke on several occasions after submission of the Year 2003 Selective Review Response and before the Decisions were issued; on none of those occasions, was EPISD expressly advised that the SLD desired additional information or materials on EPISD's ability to pay the EPISD Share. If so, EPISD would have immediately provided such information, including without limitation a statement of its Fund Balance.

It is very important to recognize that EPISD had previously submitted to the SLD written statements as to the Fund Balance in prior years. For instance, in a response to the Selective Review requests for Year 2002 of the Program, EPISD had provided to the SLD staff detailed information as to its financial condition and Fund Balance. True and correct copies of relevant excerpts from the prior response are set forth on Exhibits "23" of the accompanying Appendix [incorporated herein by reference]. This information included a memorandum from EPISD's then-current Associate Superintendent - Finance, similar to the one submitted with the Year 2003 Selective Review Response. Thereafter, based upon communications between the SLD and EPISD, the SLD in fact did request further information on EPISD's finances. True and correct copies of these subsequent

communications are set forth on Exhibits "24" of the accompanying Appendix [incorporated herein by reference], and include another similar memorandum. The SLD was satisfied with the financial information in the prior year, and did not deny EPISD funding for inability to establish its ability to pay its share of E-Rate services.

Based upon its experience in the prior year, and the SLD's acceptance of the memorandum then, EPISD had no reason to believe that the SLD wanted something further than the memorandum for Year 2003. If it had done so, EPISD would have immediately provided the requested information, which was readily available if requested.

The SLD as a whole, and especially the same SLD personnel receiving the Year 2003 Selective Review Response, had actual knowledge of EPISD's Fund Balance, and were well aware that EPISD had more than enough money to pay the EPISD Share.

Apparently, the SLD is now contending that EPISD should have provided additional information and materials in the Year 2003 Selective Review Response as to the Fund Balance. EPISD disagrees with that contention and believes its response was sufficient, whether or not one considers the detailed information provided beforehand to the SLD.

It is significant to note that neither the Form 470, the Form 470 Instructions [set forth as Exhibit "25" to the Appendix and incorporated herein by reference], the Form 471 Applications, nor the Form 471 Instructions [set forth as Exhibit "26" to the Appendix and incorporated herein by reference] require an applicant to provide a budget, financial statements, or similar materials to demonstrate that it has secured funds to pay its share of the charges. Moreover, the SLD's own website states as follows in relevant part [set forth as Exhibit "27" of the Appendix and incorporated

herein by reference]:

"Secured access" means that you can show that these funds are, or will be, part of your annual budget; or, if you are obtaining the funds from an outside source, that these funds have been promised to you. If you obtain these funds from an outside source, the funds must not come directly or indirectly from your service provider(s).

That website excerpt also does not affirmatively state that a financial statement or budget must be provided to the SLD.

Nevertheless, even if the Year 2003 Selective Review Response insufficiently addressed the issue of EPISD's ability to pay the EPISD Share, the SLD should have provided EPISD with an opportunity to supplement its response. If such supplement was insufficient or not made altogether, then a denial might be in order. Allowance of such an opportunity to cure an allegedly insufficient response [as opposed to a total failure to respond] would be fair, reasonable, and appropriate in these circumstances.

There are a large number of orders by the Commission addressing "necessary resources" determination [i.e.- the applicant has the necessary resources to pay its share]. Those Commission decisions, though, seem to indicate that the SLD will and should check up with the applicant on any questions about necessary resources, and then ask for additional proof of funding availability. In fact, the decisions upholding the SLD denials generally involved situations where the applicant failed to respond at all to SLD requests, or failed to respond adequately to repeated SLD requests for further information on "necessary resources".

Importantly, the Commission ruled in Order No. DA 03-245 released January 30, 2003 in the consolidated case of Beginning with Children Charter School, Brooklyn, New York, File No. SLD-256153, and Yeshiva Karlin-Stolin, File No. SLD-265665 (the "BWC/Yeshiva Order"), that:

We therefore agree with SLD's determination that the budgets provided by the Applicants, as part of their applications, did not demonstrate ability to pay.

Under its normal operating procedures, however, when SLD identifies such problems with the budget or other initial documentation proffered by an applicant to demonstrate ability to pay, it generally contacts the applicant and provides an opportunity to remedy the difficulty. For example, in instances where the budget or other documentation initially submitted does not demonstrate that sufficient funds have been secured to pay for all the services, an applicant is given an opportunity to submit further documentation on this issue. Alternatively, if the budget demonstrates sufficient funds but also reveals an overall budget deficit, an applicant is permitted to demonstrate how additional revenues will be obtained to cover the deficit or to stipulate to other expenses that will be eliminated. Finally, if an applicant can demonstrate that it had a good faith, reasonable basis at the time the application was filed for stating that it had secured the necessary funds but that events subsequent to the filing, such as unanticipated budget cuts, have now rendered it unable to pay for all of its FRNs, SLD provides the applicant with the opportunity to select a subset of its FRNs that its current funds can cover.

In BWC's case, only a portion of its overall budget relied on revenues to be raised and it had in fact raised revenues in excess of the amount to be used to fund costs associated with the schools and libraries program. In Yeshiva's case, the budget discrepancy was minimal (only \$175.36). Given these circumstances, we think it is appropriate for SLD to provide each applicant an opportunity to provide additional documentation to demonstrate compliance with the Commission's rules.

We emphasize that SLD should continue to require appropriate proof of an applicant's assertions, in order to guard against waste and fraud. We also wish to emphasize that the ultimate burden of proof remains on the applicant. We do not require SLD to repeatedly contact applicants for new or clarifying information. Where an applicant has submitted a budget that does not adequately demonstrate ability to pay, however, we believe that providing an applicant an opportunity to address the problem will provide a better balance between the need for administrative efficiency and the interests of eligible schools and libraries in receiving discounts. We leave to SLD's reasonable discretion whether further contacts should be made, considering such factors as whether the remaining problem is relatively simple or involves a small amount, the attempts made by SLD to resolve it previously, and the responses to previous inquiries.

In light of these conclusions, we remand the pending applications to SLD so that it may provide each applicant in the instant Request for Review an opportunity to address the problems with the applicant's budget in a manner consistent with the procedures described above. Thus, on remand, BWC should be permitted an opportunity to address the apparently unsecured funds in its budget by such means as demonstrating that the anticipated funds

have been secured, providing alternate, secured sources for the funds are available, or demonstrating that it is cutting expenses in the budget unconnected to its discounted service obligations to cover the shortfall. Similarly, Yeshiva should be permitted to demonstrate that it can cover the entire \$18,175.36 amount of its share of the costs, including the \$175.36 amount not covered in its original budget.

In the case at hand, the Year 2003 Selective Review Response was equivalent to the submission of a budget to the SLD as in the BWC/Yeshiva Order, being the first time the SLD requested the financial information from EPISD. Under the reasoning of the BWC/Yeshiva Order, the SLD was obligated, if it believed the response to be inadequate, to permit EPISD an opportunity to provide supplemental information and materials to demonstrated EPISD's ability to secure funds to pay the EPISD Share. If the SLD had done so, the EPISD would have provided such information, including without limitation a Fund Balance statement and budget, and there would have been no denials by the SLD of the Form 471 Applications.

Each of the Decisions is erroneous in this regard.

3. In summary, the Decisions should be reversed.

As shown above, it is absolutely clear that EPISD had secured the funds necessary to pay the EPISD Share, and that the SLD was aware that EPISD had so secured such funds. Alternatively, to the extent the SLD felt that EPISD's Year 2003 Selective Review Response failed to sufficiently demonstrate that point, it should have expressly advised EPISD of the same and permitted EPISD an opportunity to cure that alleged deficiency. That, as noted by this Commission in prior decisions, appeared to be the common practice of SLD. In light of the SLD's failure to do so with EPISD in this instance cannot help but lead EPISD to wonder whether the SLD's action was inappropriate retaliation against EPISD for its prior appeal of SLD's denials of funding for Funding Year 2002 of

the Program, as part of the so-called Ysleta order.

Each of decisions by the SLD is in error, is arbitrary and capricious, is not adequately supported, and should be reversed, or at minimum remanded for further consideration.

V. CONCLUSION

EPISD made a good faith attempt at compliance with Commission requirements and any SLD requests relating to proof of its securing of the EPISD Share. There can be no dispute that EPISD had a Fund Balance far more than sufficient to pay for the EPISD Share, that EPISD had promised to use the necessary portion of the Fund Balance to pay the EPISD Share, that EPISD timely provided a written response on those points to the SLD, that the SLD never expressly advised EPISD [prior to the Decisions being issued] of the SLD's belief that such response was insufficient, and that the SLD already possessed detailed information concerning EPISD's financial condition and the Fund Balance.

EPISD is a poor district with many poor students, and each have many needs, especially in the technology area. Currently, 68% of EPISD's students are eligible for "free and reduced lunches" under federal law, though many of its schools have a much higher proportion. The 2000 Profile of Selected Economic Characteristics issued by the United States Census Bureau estimates the per capita income for 1999 in the El Paso, Texas area at \$14,388 per year. For comparison, according to the same survey, the annual per capita income for 1999 in the United States was \$21,587, for the State of Texas was \$19,617, and for the Washington D.C. area was \$28,659. As one can readily see, EPISD students are extremely poor, and in great need of the benefits from the Projects to be completed using Program funding.

EPISD believes that the SLD is essentially "changing the rules" at the last-minute concerning proof of securing of funds, and thereby depriving its needy and deserving students from a fair opportunity to learn and attempt to escape the poverty and circumstances in which so many have been born and raised.

Based upon the foregoing, additionally and in the alternative, the Decisions are erroneous, and the Commission should reverse each of the Decisions and award full funding to EPISD under the Form 471 Applications, at least consistent with the funding levels granted to other recipients with a similar "free and reduced lunch" proportion of their school populace. At minimum, the Commission should remand to the SLD for consideration, based upon the information provided in the Appendix, as to whether EPISD has established that it has secured funding for the EPISD Share.

EPISD greatly appreciates the funding it has received in the past from the Program, and believes that such funding has been significantly assisted EPISD in trying to provide technology resources to its students, on average some of the neediest in the entire country.

It is therefore with reluctance that EPISD even brings this Request for Review. EPISD does not believe that it failed to demonstrate that it had secured the necessary funds for the EPISD Share, and certainly did not intend to fail to do so. Nevertheless, due to the erroneous Decisions of the SLD, and the resulting harm to EPISD and its students, this Request for Review is made.

SIGNED as of the 26th day of February, 2004.

Respectfully submitted,

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Certificate of Service

I, Michaelleen I. Terrana, hereby certify that true and correct copies of the preceding Request for Review of El Paso Independent School District was served this February 27, 2004 via hand delivery upon the following parties:

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Michaelleen I. Terrana
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February 27, 2004